Supreme Court, U.S.
FILED
SEP 25 1998
OFFICE OF THE CLERK

(8) (8)

Nos. 97-1184 and 97-1243

In the Supreme Court of the United States

OCTOBER TERM, 1997

NATIONAL FEDERATION OF FEDERAL EMPLOYEES, LOCAL 1309, PETITIONER

v.

UNITED STATES DEPARTMENT OF THE INTERIOR, ET AL.

FEDERAL LABOR RELATIONS AUTHORITY, PETITIONER

v.

UNITED STATES DEPARTMENT OF THE INTERIOR, ET AL.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

BRIEF FOR THE RESPONDENT

SETH P. WAXMAN
Solicitor General
Counsel of Record
FRANK W. HUNGER
Assistant Attorney General
BARBARA D. UNDERWOOD
Deputy Solicitor General
JONATHAN E. NUECHTERLEIN
Assistant to the Solicitor General
WILLIAM KANTER
ROBERT M. LOEB
SUSHMA SONI
Attorneys
Department of Justice
Washington, D.C. 20530-0001
(202) 514-2217

CH PP

QUESTION PRESENTED

Whether the Federal Labor Relations Authority may compel a federal agency employer to bargain with a union about, and face the prospect of binding arbitration on, a proposal that would commit the employer to negotiate midterm "on any negotiable matters not covered by the provisions" of the collective bargaining agreement in which the proposal would be included.

TABLE OF CONTENTS

	Page
Opinions below	1
Jurisdiction	2
Statement	2
Summary of argument	8
Argument:	
I. Congress deliberately excluded any general midterm bargaining duty from the scope of an agency's bargaining obligations	11
A. The FLRA's position is inconsistent with the language and structure of the Statute	11
B. The FLRA's position contradicts the core statutory objective of ensuring "an effective and efficient Government"	22
C. The FLRA's position contradicts the legislative history and prior administrative practice	33
D. The FLRA's position is not entitled to *Chevron* deference	37
II. The FLRA may not use contractual midterm bargaining clauses to create indirectly a midterm bargaining regime that the Statute has rejected	39
Conclusion	47

TABLE OF AUTHORITIES

Cases:

Army & Air Force Exchange Service, Case No. 22-6657 (CA), 2 *Rulings on Request for Review* (1976)	35
AFGE v. *FLRA*, 750 F.2d 143 (D.C. Cir. 1984)	25
AFGE, Local 163, 52 F.L.R.A. 1063 (1997)	21
AFGE, Local 2782 v. *FLRA*, 702 F.2d 1183 (D.C. Cir. 1983)	20, 21
AFGE, Local 3354, No. O-NG-2407, 1998 WL 598537 (FLRA Aug. 31, 1998)	21

Cases—Continued: Page

Atchison, T. & S.F. Ry. v. *Peña*, 44 F.3d 437 (7th Cir. 1994), aff'd on grounds *sub nom. Brotherhood of Locomotive Eng'rs* v. *Atchison, T. & S.F. Ry.*, 516 U.S. 152 (1996) 38, 39
Bureau of Alcohol, Tobacco & Firearms v. *FLRA*:
464 U.S. 89 (1983) 11, 31, 34, 38, 44, 46
672 F.2d 732 (9th Cir. 1982), rev'd, 464 U.S. 89 (1983) 25
Chevron U.S.A. Inc. v. *Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984) 10, 37
Department of Commerce, Patent & Trademark Office:
53 F.L.R.A. 539 (1997) 38
53 F.L.R.A. 858 (1997) 44
Department of Defense, Army-Air Force Exchange Serv. v. *FLRA*, 659 F.2d 1140 (D.C. Cir. 1981) 39
Department of Energy, 51 F.L.R.A. 124 (1995) 5, 6
Department of Energy v. *FLRA*, 106 F.3d 1158 (4th Cir. 1997) 5, 6, 7, 30, 40
Department of Health & Human Servs., Social Security Admin.:
44 F.L.R.A. 230 (1992) 17
47 F.L.R.A. 1004 (1993) 29, 30, 38
No. 94 F.S.I.P. 47, 1994 WL 412309 (Aug. 3, 1994) 40
Department of the Navy v. *FLRA*, 962 F.2d 48 (D.C. Cir. 1992) 19, 28, 29
Department of Transp., FAA, A/SLMR No. 517, 5 A/SLMR 344 (1975) 35
Department of the Treasury v. *FLRA*, 836 F.2d 1381 (D.C. Cir. 1988) 45
FAA Northwest Mountain Region, 14 F.L.R.A. 644 (1984) 46
FAA, Washington, D.C., 20 F.L.R.A. 273 (1985) 46
FLRA v. *IRS*, 838 F.2d 567 (D.C. Cir. 1988) 28, 29
Fort Stewart Schools v. *FLRA*, 495 U.S. 641 (1990) 24, 41

Cases—Continued: Page

Government Printing Office, 13 F.L.R.A. 203 (1983) 21
Headquarters, 127th Tactical Fighter Wing, Mich. Air. Nat'l Guard, 46 F.L.R.A. 582 (1992) 38
HHS v. *FLRA*, 844 F.2d 1087 (4th Cir. 1988) 3, 37, 39
Indiana Air Nat'l Guard v. *FLRA*, 712 F.2d 1187 (7th Cir. 1983) 43
Internal Revenue Serv.:
17 F.L.R.A. 731 (1985) 3, 4, 10, 24, 25, 27, 34, 35, 36, 44
29 F.L.R.A. 162 (1987) 4, 38
IRS v. *FLRA*, 717 F.2d 1174 (7th Cir. 1983) 20
National Treasury Employees Union v. *FLRA*, 810 F.2d 295 (D.C. Cir. 1987) 4
NLRB v. *Bildisco & Bildisco*, 465 U.S. 513 (1984) 16
NLRB v. *Insurance Agents' Int'l Union*, 361 U.S. 477 (1960) 12, 22
NLRB v. *Jacobs Mfg. Co.*, 196 F.2d 680 (2d Cir. 1952) 13
NLRB v. *Sands Mfg. Co.*, 306 U.S. 332 (1939) 12
Overseas Educ. Ass'n v. *FLRA*, 827 F.2d 814 (D.C. Cir. 1987) 43
Patent & Trademark Office, 45 F.L.R.A. 1090 (1992), pet'n for enforcement denied, 991 F.2d 790 (4th Cir. 1993) 38
Pauley v. *BethEnergy Mines, Inc.*, 501 U.S. 680 (1991) 38
Social Security Admin. v. *FLRA*, 956 F.2d 1280 (4th Cir. 1992) ..... *passim*

Statutes and regulation:

Civil Service Reform Act of 1978, Pub. L. No. 95-454, Tit. VII, 92 Stat. 111 2
Federal Service Labor-Management Relations Statute, 5 U.S.C. 7101 *et seq.* 2
5 U.S.C. 7101(a) 32
5 U.S.C. 7101(b) 10, 22, 32, 33, 37, 43, 47

Statutes and regulation—Continued: Page

5 U.S.C. 7102 18
5 U.S.C. 7102(2) 18
5 U.S.C. 7103(a)(3) 3
5 U.S.C. 7103(a)(8) 16
5 U.S.C. 7103(a)(12) 16, 17, 41
5 U.S.C. 7103(a)(14) 41
5 U.S.C. 7103(a)(14)(C) 2, 41
5 U.S.C. 7105(a)(2)(G) 2
5 U.S.C. 7106 ..... 20, 21, 22, 27
5 U.S.C. 7106(a) 20, 46
5 U.S.C. 7106(a)(1) 33, 43
5 U.S.C. 7106(a)(2)(D) 33
5 U.S.C. 7106(b) 20, 21, 22
5 U.S.C. 7106(b)(1) 21
5 U.S.C. 7106(b)(2) 2, 9, 20, 21, 33
5 U.S.C. 7106(b)(3) 2, 9, 20, 21, 33
5 U.S.C. 7111(f)(3) 17
5 U.S.C. 7114 20
5 U.S.C. 7114(a) 14, 18
5 U.S.C. 7114(a)(1) 14
5 U.S.C. 7114(a)(4) ..... *passim*
5 U.S.C. 7114(b)(1) 14
5 U.S.C. 7114(b)(3) 14
5 U.S.C. 7114(b)(5) 14
5 U.S.C. 7114(c)(2) 5
5 U.S.C. 7116(a)(1) 6
5 U.S.C. 7116(a)(5) 2, 6, 21
5 U.S.C. 7116(b)(5) 2
5 U.S.C. 7116(b)(7) 23
5 U.S.C. 7117(a) 40, 41, 42
5 U.S.C. 7117(a)(1) 2, 41
5 U.S.C. 7117(a)(2) 2, 41
5 U.S.C. 7118(a)(6) 2
5 U.S.C. 7118(a)(7)(B) 17
5 U.S.C. 7119(b)(1) 3, 23
5 U.S.C. 7119(c)(1) 23
5 U.S.C. 7119(c)(5) 23, 39
5 U.S.C. 7119(c)(5)(B)(iii) 3, 23
5 U.S.C. 7119(c)(5)(C) 3
5 U.S.C. 7123(a) 3

Statutes and regulation—Continued: Page

5 U.S.C. 7131 10
5 U.S.C. 7131(a) 17, 25
5 U.S.C. 7131(d) 25
5 U.S.C. 7135(b) 34
National Labor Relations Act, 29 U.S.C. 151 *et seq.* 8, 11
§ 2(2), 29 U.S.C. 152(2) 3
§ 8(a)(5), 29 U.S.C. 158(a)(5) 8, 12, 13
§ 8(d), 29 U.S.C. 158(d) 8, 12, 13, 16, 18, 19
5 U.S.C. 5331 *et seq.* 24
5 U.S.C. 5341 *et seq.* 24
5 U.S.C. 6101 *et seq.* 24
5 U.S.C. 7501 *et seq.* 24
29 U.S.C. 186(c)(1) 25
29 U.S.C. 668(a)(1) 33
Exec. Order No. 11,491, 5 U.S.C. 7101 note 34

Miscellaneous:

124 Cong. Rec. (1978):
p. 28,796 34
p. 29,182 34
p. 38,715 21
B. Duke, Note, *Regulating the Internal Labor Market*, 93 Colum. L. Rev. 932 (1993) 16
Federal Labor Relations Council, *Report and Recommendation on the Amendment of Executive Order 11491*, as amended, *reprinted in Labor-Management Relations in the Federal Service* (1975) 34-35
F. Ferris, *Union-Initiated Mid-Term Bargaining: A Catalyst in Reshaping Conflict Patterns*, 5 Negotiation J. 407 (Oct. 1989) 9, 10, 22, 23, 24, 27, 28, 29, 30, 31, 44
R. Gorman, *Basic Text on Labor Law, Unionization and Collective Bargaining* (1976) 13
S. Rep. No. 969, 95th Cong., 2d Sess. (1978) 36
Webster's Third New International Dictionary (1986) 15, 16

In the Supreme Court of the United States

OCTOBER TERM, 1997

No. 97-1184

NATIONAL FEDERATION OF FEDERAL EMPLOYEES, LOCAL 1309, PETITIONER

v.

UNITED STATES DEPARTMENT OF THE INTERIOR, ET AL.

No. 97-1243

FEDERAL LABOR RELATIONS AUTHORITY, PETITIONER

v.

UNITED STATES DEPARTMENT OF THE INTERIOR, ET AL.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

BRIEF FOR THE RESPONDENT

OPINIONS BELOW

The opinion of the court of appeals (97-1243 (FLRA) Pet. App. 1a-12a; 97-1184 (NFFE) Pet. App. 1a-10a) is reported at 132 F.3d 157. The opinion of the Federal Labor Relations Authority (97-1243 (FLRA) Pet. App. 13a-26a; 97-1184 (NFFE) Pet. App. 11a-23a) is reported at 52 F.L.R.A. 475.

JURISDICTION

The judgment of the court of appeals was entered on October 31, 1997. The National Federation of Federal Employees (NFFE) filed a petition for a writ of certiorari in No. 97-1184 on January 15, 1998, and the Federal Labor Relations Authority (FLRA) filed a petition for a writ of certiorari in No. 97-1243 on January 28, 1998. This Court issued a writ of certiorari and consolidated the cases on June 1, 1998. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. The Federal Service Labor-Management Relations Statute, 5 U.S.C. 7101 *et seq.* (Statute), enacted as Title VII of the Civil Service Reform Act of 1978, Pub. L. No. 95-454, 92 Stat. 111, establishes the right of federal employees to organize, select an exclusive representative, and engage in collective bargaining about a circumscribed range of topics. See generally p. 24, *infra*. The Statute requires the management officials of federal agencies to meet and bargain in good faith with the employees' chosen union for the purpose "of arriving at a collective bargaining agreement." 5 U.S.C. 7114(a)(4). Management officials must also bargain about certain issues arising from changes that an agency makes to conditions of employment during the term of a collective bargaining agreement. See 5 U.S.C. 7106(b)(2) and (3). The duty to bargain in good faith does not, however, extend to matters "inconsistent with any Federal law." *E.g.*, 5 U.S.C. 7117(a)(1) and (2); see also 5 U.S.C. 7103(a)(14)(C) (excluding matters "specifically provided for by Federal statute").

A refusal to negotiate in good faith as required by the Statute is an unfair labor practice. 5 U.S.C. 7116(a)(5) and (b)(5). Under Sections 7105(a)(2)(G) and 7118(a)(6), the Federal Labor Relations Authority (FLRA) has jurisdiction to consider charges of unfair labor practices. Its final orders in such proceedings are subject to judicial review "in the

United States court of appeals in the circuit in which the [aggrieved] person resides or transacts business or in the United States Court of Appeals for the District of Columbia." 5 U.S.C. 7123(a).

Unlike employees in the private sector, federal employees are forbidden to strike. Nonetheless, if good faith negotiations between a federal agency and a union reach impasse, federal employees may take advantage of a statutory remedy that is not available to their private-sector counterparts: they may seek resolution of the parties' substantive disagreements from the Federal Service Impasses Panel. See 5 U.S.C. 7119(b)(1); see also *Social Security Admin.* v. *FLRA*, 956 F.2d 1280, 1287 (4th Cir. 1992) (*SSA*). The Impasses Panel may "take whatever action is necessary and not inconsistent with [the Statute] to resolve the impasse," 5 U.S.C. 7119(c)(5)(B)(iii), such as imposing a union's proposals, in the course of binding arbitration, on the agency. 5 U.S.C. 7119(c)(5)(C). "A duty to bargain over a proposal, therefore, does more than simply require an agency to negotiate; it subjects the agency to the possibility that the proposal will become binding." *SSA*, 956 F.2d at 1282 (quoting *HHS* v. *FLRA*, 844 F.2d 1087, 1089 (4th Cir. 1988) (en banc)).

2. a. In 1985, the FLRA first considered whether the Statute imposes on federal agencies a statutory duty to bargain with public-sector unions,[1] at the unions' initiative, during the course of an existing collective bargaining agreement. *Internal Revenue Serv.*, 17 F.L.R.A. 731, 736-737 (1985) (*IRS I*). The FLRA held that the statutory duty to bargain does *not* require agencies to engage in such "mid-

---

[1] We use the term "public sector" as a shorthand for the jurisdictional scope of the Statute, which addresses the relations between federal agencies and the exclusive representatives of federal employees. As used here, therefore, the term does not include labor-relations issues involving state and local governments. See generally 5 U.S.C. 7103(a)(3); 29 U.S.C. 152(2).

term" bargaining, because, among other considerations, the availability of such bargaining would "encourage dispersal of the collective bargaining process" and create incentives for "continuous bargaining on an issue-by-issue basis." *Ibid.* "Such an approach," the FLRA concluded, "would inject uncertainty into the parties' relationship, enhance the prospect for protracted conflict, and could lead to the continuous expenditure of resources for both management and exclusive representatives." *Id.* at 737.

On review, the D.C. Circuit invalidated the FLRA's position as contrary to the Statute, holding that an agency-employer's duty to bargain does extend to union proposals made during the term of a collective bargaining agreement. *National Treasury Employees Union* v. *FLRA*, 810 F.2d 295 (D.C. Cir. 1987) (*NTEU*). In reaching that conclusion, the court relied on private-sector labor law precedent and on a perceived statutory purpose of strengthening the federal unions and encouraging collective bargaining. *Id.* at 300-301. On remand, the FLRA acquiesced in the D.C. Circuit's decision, see *SSA*, 956 F.2d at 1283, and held that the statutory duty to bargain in good faith "requires an agency to bargain during the term of a collective bargaining agreement on negotiable union proposals concerning matters which are not contained in the agreement unless the union has waived its right to bargain about the subject matter involved." *Internal Revenue Serv.*, 29 F.L.R.A. 162, 166 (1987) (*IRS II*).

b. Several years later, in *SSA*, *supra*, the Fourth Circuit reviewed a federal agency's challenge to the FLRA's application of its new policy concerning union-initiated midterm bargaining. The Fourth Circuit found that policy inconsistent with the text, structure, and purposes of the Statute. The court first explained that the language of the Statute "strongly suggests that bargaining over midterm union proposals was not mandated by Congress," because "Congress addressed the duty to bargain in language that seems to contemplate that such a duty arises as to only one, basic agree-

ment," 956 F.2d at 1284, a position supported by the legislative history of the Statute and by prior practice under a previously applicable Executive Order. *Id.* at 1284-1286.

The Fourth Circuit also reasoned that reliance on private-sector labor practice would be "inappropriate" here. *Id.* at 1287. It observed that public-sector bargaining rights under the Statute are more limited than those in the private sector, and that important legal distinctions between the two sectors—including the general availability of binding arbitration in the public sector—bar application of private-sector principles to the question of public-sector midterm bargaining. *Ibid.* Finally, the court determined that union-initiated midterm bargaining would threaten the Statute's underlying purposes by causing instability in labor-management relations and by discouraging comprehensive resolution of issues in the basic collective bargaining agreements themselves. *Id.* at 1288.

The Fourth Circuit revisited this area in *Department of Energy* v. *FLRA*, 106 F.3d 1158 (1997) (*DOE*). In that case, the union had proposed, in the course of bargaining over a collective bargaining agreement, the inclusion of a clause that would have permitted it to make further substantive proposals during the course of the agreement and would have required the federal agency to bargain over such proposals. See *id.* at 1161. The parties failed to reach agreement on the midterm bargaining clause, and, in binding arbitration, the Impasses Panel imposed the clause on the agency, principally on the theory that the clause simply restated the union's purported statutory right to insist on midterm bargaining. See *ibid.* After the relevant agency head exercised his authority to disapprove the provision as contrary to law (see 5 U.S.C. 7114(c)(2)), the union commenced an unfair labor practice proceeding, and the FLRA held that the agency had committed an unfair practice. *Department of Energy*, 51 F.L.R.A. 124 (1995). In so holding, the FLRA distinguished *SSA* as addressing only whether the Statute

itself mandates bargaining over union-initiated midterm proposals, not whether a contract provision requiring such bargaining is subject to compulsory negotiation and subsequent imposition by the Impasses Panel. *Id.* at 127-128.

The Fourth Circuit granted the agency's petition for review and denied enforcement of the FLRA's decision. *DOE*, *supra*. The court concluded that its *SSA* decision "compels the conclusion that a clause requiring an agency to engage in union-initiated midterm bargaining is inconsistent with the [Statute] and, consequently, is not negotiable." 106 F.3d at 1163. Otherwise, the court reasoned, a union could "circumvent *SSA* by the mere expedient of negotiating to impasse on a midterm bargaining provision, essentially requiring an agency to bargain midterm over union proposals despite our determination that such a requirement is contrary to the [Statute]." *Id.* at 1164. The court concluded that the agency was not required to negotiate over the clause.

3. a. This case, like *DOE*, involves a public-sector union's efforts to include a midterm bargaining clause in its collective bargaining agreement. During negotiations with the United States Geological Survey (a subagency of the United States Department of the Interior), Local 1309 of the National Federation of Federal Employees (NFFE) submitted the following proposal regarding "Union-initiated Bargaining":

> The Union may request and the Employer will be obliged to negotiate on any negotiable matters not covered by the provisions of this agreement.

FLRA Pet. App. 14a. The Survey declared this proposal nonnegotiable based on the Fourth Circuit's decision in *SSA*. *Id.* at 15a. NFFE filed a charge with the FLRA alleging, *inter alia*, that the Survey had committed an unfair labor practice by refusing to negotiate over the proposal. *Id.* at 14a; see 5 U.S.C. 7116(a)(1) and (5).

The FLRA agreed that the Survey had committed an unfair labor practice, holding that the proposal was "substantially identical" to a midterm bargaining proposal that the FLRA had previously found negotiable, and that the proposal simply "reiterated a right the Union had under the Statute." FLRA Pet. App. 19a, 21a. The FLRA acknowledged the Fourth Circuit's holding in *SSA*, but restated its alternative position that *SSA* did not foreclose a union's right to insist on the inclusion of a midterm bargaining clause in an agreement with the agency employer. *Id.* at 20a. The FLRA thus ordered the agency to bargain over the proposal. *Id.* at 24a-25a.

b. The Fourth Circuit granted the Survey's petition for review of the FLRA's decision and denied the FLRA's cross-application for enforcement. FLRA Pet. App. 2a-3a. The court first noted that in *DOE* it had held that "[n]ot only is union-initiated midterm bargaining not mandated by the [Statute], but [it is] also . . . *contrary* to the [Statute]." *Id.* at 7a (quoting *DOE*, 106 F.3d at 1163). The court then concluded that its prior precedents in *SSA* and *DOE* controlled this case. Although *DOE* involved a midterm bargaining requirement actually imposed by the Impasses Panel, the court determined that this distinction was "not critical" because "[t]he same practical consequences flowing from the impasse procedures that made the distinction between a statutory requirement and general duty to bargain of no consequence in [*DOE*] obtain here." *Id.* at 9a. Holding that union-initiated midterm bargaining proposals are negotiable, the court reasoned, would enable a union to circumvent *SSA* by negotiating such a proposal to impasse, at which point the Impasses Panel (which adheres to the FLRA's views on midterm-bargaining obligations) would normally impose the proposal on the parties in binding arbitration. *Ibid.* The court rejected petitioners' efforts to distinguish *SSA* and *DOE* on the ground that "a duty to bargain is different for

the purpose at hand from a duty to bargain about whether to bargain." *Id.* at 9a-10a.[2]

SUMMARY OF ARGUMENT

1. a. In defining the scope of a federal agency employer's duty to bargain, Congress used language that is conspicuously—and dispositively—different from the language in the corresponding portions of the National Labor Relations Act (NLRA), the legislation upon which much of the Statute is otherwise based. Whereas the NLRA broadly directs private-sector employers "to bargain collectively" with unions and expressly extends that obligation to midterm bargaining (29 U.S.C. 158(a)(5) and (d)), the Federal Service Labor-Management Relations Statute obligates federal agency employers only to "negotiate * * * for the purposes of *arriving at a collective bargaining agreement*." 5 U.S.C. 7114(a)(4) (emphasis added). That language specifically excludes what petitioners seek here: a general duty to bargain not only for the purpose of "arriving at" a "collective bargaining agreement," but for the additional purpose of *supplementing* a completed agreement during its term. Petitioners unpersuasively seek to avoid that conclusion by redefining the term "collective bargaining agreement" to mean any product of bargaining, no matter how trivial in scope. But Congress used that term in its ordinary sense, to denote a comprehensive labor contract, not in the highly idiosyncratic sense that petitioners propose here.

The striking contrast between Section 7114(a)(4) and the corresponding language of the NLRA manifests a basic congressional policy choice to exclude midterm negotiations from the scope of an agency employer's general bargaining obligations. That policy choice is also evident in Congress's

---

[2] We have been informed that the parties have recently renegotiated their collective bargaining agreement. As before, the parties disagreed on the negotiability of the same midterm bargaining provision at issue in the underlying proceedings.

imposition of a more specific duty to bargain when agency employers exercise their prerogative to make midterm changes affecting the conditions of employment. See 5 U.S.C. 7106(b)(2) and (3). "When Congress did require midterm bargaining, it thus spelled out the context in which such bargaining was to take place. The inclusion of a specific duty of midterm effects bargaining, therefore, suggests the inadvisability of reading a more general duty into the statute." *Social Security Admin.* v. *FLRA*, 956 F.2d 1280, 1284 (4th Cir. 1992) (*SSA*). Similarly, both the legislative history of the Statute and pre-enactment administrative practice confirm that Congress intended to confine an agency employer's midterm bargaining obligations to circumstances involving midterm changes to the conditions of employment.

b. Congress had important reasons for excluding from the public sector the general midterm bargaining rights it had created in the private sector. First, unlike private-sector unions, which must rely on the use or threat of economic weapons to resolve disputes with management, public-sector unions may subject federal agency employers to binding, substantive arbitration upon impasse, an extraordinary remedy with no counterpart in the private sector. Recognition of general midterm bargaining rights has thus had, in the words of one leading union negotiator, "far more impact in the federal sector than the private sector," because the "bargaining power" of a public-sector union "does not depend on building support for a mid-contract strike" but is instead "merely a function of a legal process the union can invoke without cost." F. Ferris, *Union-Initiated Mid-Term Bargaining: A Catalyst in Reshaping Conflict Patterns*, 5 Negotiation J. 407, 409 (Oct. 1989) (*Catalyst*).

That is one reason why the FLRA was originally correct when, in *IRS I*, it found that the midterm bargaining rights sought here "would encourage dispersal of the collective bargaining process," generate "continuous bargaining on an

issue-by-issue basis," and threaten "the continuous expenditure of resources." *Internal Revenue Serv.*, 17 F.L.R.A. 73', 736-737 (1985). Other unique characteristics of public-sector bargaining support a similar conclusion. Those include the availability of taxpayer funding for the workday time that federal employees spend in collective bargaining, see 5 U.S.C. 7131, as well as the peculiar focus of public-sector bargaining on "smaller issues" with "narrow[] constituencies" (*Catalyst*, *supra*, at 409) rather than on the core wage and job-security issues that unionized private-sector employees generally wish to resolve in comprehensive term contracts. Finally, the midterm bargaining obligations at issue here threaten not just to impose substantial burdens on government agencies, but also to distort the substantive outcome of particular bargaining disputes, because the availability of future piecemeal bargaining would relieve unions of the need to make trade-offs among a range of issues during negotiations for a single term agreement.

c. In sum, Congress directly addressed the scope of an employer's bargaining duty and deliberately excluded the general midterm bargaining obligation proposed here. For that reason alone, the FLRA's interpretation is entitled to no deference. See *Chevron U.S.A. Inc.* v. *Natural Resources Defense Council, Inc.*, 467 U.S. 837, 842-843 (1984). In any event, even if Congress had been ambiguous on this point, deference would still be inappropriate for two reasons. First, the FLRA's position on midterm bargaining violates the Statute's own *express* rule of construction, which calls for each of the Statute's provisions to be "interpreted in a manner consistent with the requirement of an effective and efficient Government." 5 U.S.C. 7101(b). Second, the FLRA's abrupt change in position on the question presented here came only in response to an adverse ruling of the D.C. Circuit. This Court should hesitate before applying the rule of *Chevron* deference to a statutory interpretation that

appears to be attributable more to a lower court decision than to an agency's own policy choice.

2. Because Congress has made a judgment to reject general midterm bargaining obligations in the public sector, the FLRA may not thwart that judgment by forcing an agency employer to bargain over (and therefore face the prospect of binding arbitration on) the open-ended midterm bargaining clause proposed here, which would simply replicate the rejected regime in miniature. Indeed, an agency employer would have no discretion to bind itself to such midterm bargaining, because no agency may "waive" Congress's considered judgment—based on important fiscal and institutional concerns—about the proper structure of collective bargaining in the federal workplace. But even if an agency employer did have such discretion, the FLRA could not itself undermine that congressional judgment on a systematic basis by using its impasse procedures to impose open-ended midterm bargaining obligations on nonconsenting agencies throughout the federal government.

ARGUMENT

I. CONGRESS DELIBERATELY EXCLUDED ANY GENERAL MIDTERM BARGAINING DUTY FROM THE SCOPE OF AN AGENCY'S BARGAINING OBLIGATIONS

A. The FLRA's Position Is Inconsistent With The Language And Structure Of The Statute

In many respects, Congress modeled the Statute on the legislation governing private-sector labor law, the National Labor Relations Act (NLRA), 29 U.S.C. 151 *et seq.* See generally *Bureau of Alcohol, Tobacco & Firearms* v. *FLRA*, 464 U.S. 89, 92-93 (1983) (*BATF*). There are important differences between the two statutes, however, and those differences reflect the ways in which public-sector bargaining, with its emphasis on mandatory binding arbitration upon impasse, is fundamentally unlike private-sector bar-

gaining, in which disputes are resolved instead by "[t]he presence of economic weapons in reserve, and their actual exercise on occasion by the parties." *NLRB* v. *Insurance Agents' Int'l Union*, 361 U.S. 477, 489 (1960). In particular, whereas the NLRA expressly provides for broad midterm bargaining rights in the private sector, both the text and the structure of the Statute manifest a deliberate congressional choice to exclude such rights in the public sector.

1. Section 8(a)(5) of the NLRA makes it an unfair labor practice for a private-sector employer "to refuse *to bargain collectively* with the representatives of his employees," 29 U.S.C. 158(a)(5) (emphasis added), which means "to meet at reasonable times and confer in good faith with respect to wages, hours, and other terms and conditions of employment, *or* the negotiation of an agreement, *or* any question arising thereunder, and the execution of a written contract incorporating any agreement reached," 29 U.S.C. 158(d) (emphasis added). Thus, private-sector employers have a comprehensive duty to "bargain collectively" *whether or not* such bargaining is part of "the negotiation of an agreement" leading to "a written contract." Cf. *NLRB* v. *Sands Mfg. Co.*, 306 U.S. 332, 342 (1939). That duty necessarily includes bargaining "where there is in effect a collective-bargaining contract" (29 U.S.C. 158(d)): that is, midterm bargaining.

Congress recognized that, having created such a duty, it needed to qualify the duty in an important respect to protect the integrity of the underlying collective bargaining agreement itself. In the Taft-Hartley amendments of 1947, Congress provided that the NLRA "shall not be construed as requiring either party to discuss or agree to any modification of the terms and conditions contained in a contract for a fixed period, if such modification is to become effective before such terms and conditions can be reopened under the provisions of the contract." 29 U.S.C. 158(d). That restriction means that, "[w]hen a union wishes to initiate discussions concerning mandatory subjects of bargaining during the term of a

labor agreement, the employer's duty to bargain depends upon whether the union's proposals relate to terms and conditions which are 'contained in' the contract. If they are so contained, the employer need not bargain; if they are not so contained, the employer must bargain." R. Gorman, *Basic Text on Labor Law, Unionization and Collective Bargaining* 458 (1976); see *NLRB* v. *Jacobs Mfg. Co.*, 196 F.2d 680, 683 (2d Cir. 1952).

In the present Statute, by contrast, no such restriction appears, because no such restriction is necessary. See pp. 18-19, *infra*. By its plain choice of language, Congress spoke directly to the issue presented here, and it excluded midterm bargaining from the scope of a federal agency's bargaining obligations, except in one limited circumstance discussed below.

As the FLRA correctly observes (Br. 18), an agency employer's "obligation to bargain [is] set out in section 7114(a)(4)." See also NFFE Br. 14. The language in that provision is starkly—and, for purposes of this case, dispositively—different from the corresponding language in the NLRA. Whereas the NLRA imposes on private-sector employers a sweeping duty "to bargain collectively" and confirms that the duty includes bargaining during the term of the labor contract over matters not covered by the contract (see 29 U.S.C. 158(a)(5) and (d)), Section 7114(a)(4) instructs federal agency employers only to "meet and negotiate in good faith [with the union] for the purposes of *arriving at a collective bargaining agreement*." 5 U.S.C. 7114(a)(4) (emphasis added). The comparative narrowness of that language is significant. By its terms, Section 7114(a)(4) compels the parties to negotiate for purposes of "arriving at" a labor contract, and not for purposes of supplementing that contract during its term. As discussed below (at pp. 31-32), that rule is entirely equitable. Except where an employer changes the conditions of employment (in which specific circumstance the Statute elsewhere *entitles* the union to

bargain), neither the union nor the employer may force the other, against its will, to engage in midterm bargaining.

2. The FLRA contends (Br. 21-22) that this reading of Section 7114(a)(4) rests on undue inferences about Congress's use of the indefinite article. According to the FLRA, the phrase "arriving at *a* collective bargaining agreement" should be construed to be "generic and indefinite with respect to number" (FLRA Br. 22), and at all events not to mean "arriving at *one* collective bargaining agreement."

Congress's use of a singular noun is indeed an obstacle to the FLRA's position, as the Fourth Circuit recognized,[3] but it is not the primary obstacle. Section 7114(a)(4) forecloses the FLRA's position not only because the bargaining duty it

---

[3] See *SSA*, 956 F.2d at 1284 ("[t]he statutory assumption seems to have been that of one comprehensive agreement that serves to ensure workplace stability during its designated term"); accord 5 U.S.C. 7114(b)(1) (duty to negotiate under Section 7114(a) "include[s] the obligation * * * to approach the negotiations with a sincere resolve to reach a collective bargaining agreement"); 5 U.S.C. 7114(b)(5) (requiring parties "to take such steps as are necessary to implement such agreement"). Petitioner NFFE seeks support for its contrary position (Br. 15-16 & n.4) in the use of a plural noun in Section 7114(a)(1), which does not address the scope of an employer's bargaining obligations but simply authorizes a "labor organization which has been accorded exclusive recognition" to "act for, and negotiate collective bargaining agreements covering, all employees in the unit." 5 U.S.C. 7114(a)(1). As the Fourth Circuit recognized, however, the use of the plural in that provision simply contemplates "successive, not overlapping, labor contracts" that a union may negotiate over time. *SSA*, 956 F.2d at 1284 n.1. Indeed, if anything, the use of the plural in Section 7114(a)(1) is further evidence that Congress acted deliberately when it made contrasting use of the singular in Section 7114(a)(4), which *does* address the scope of an employer's duty to bargain. Finally, the separate duty "to meet at reasonable times and convenient places as frequently as may be necessary, and to avoid unnecessary delays" (5 U.S.C. 7114(b)(3)) simply obligates the parties to act reasonably and expeditiously in the circumstances in which the Statute independently imposes a bargaining obligation. Despite NFFE's contrary suggestion (Br. 15), Section 7114(b)(3) does not itself identify those circumstances.

creates is limited to "negotiat[ing] * * * for the purposes of arriving at *a* collective bargaining agreement," but also, more fundamentally, because that duty is limited to "negotiat[ing] * * * for purposes of *arriving at* a *collective bargaining agreement*." To "arrive" is to "reach a destination" or to "gain or achieve an end." *Webster's Third New International Dictionary* 121 (1986). What Section 7114(a)(4) requires is that agency employers bargain with public-sector unions to reach the typical destination in labor-management relations: a "collective bargaining agreement," which comprehensively defines the rights and obligations of the parties for a period of years (typically three, as in the private sector). In marked contrast to its counterpart in the NLRA, Section 7114(a)(4) carefully excludes any ongoing obligation, after such an agreement is "arriv[ed] at," to bargain for the additional purpose of *supplementing* the agreement during its term whenever the union so demands.

Petitioner NFFE would nonetheless read a midterm bargaining right into the language of Section 7114(a)(4) by construing the term "collective bargaining agreement" to include not just (or even primarily) a basic labor contract, but also any product of any bargaining, no matter how trivial in scope. See NFFE Br. 14-17. Under that interpretation, the relationship between an agency and a union could be characterized not by a comprehensive agreement applicable to a range of issues and renegotiated from term to term, but by a proliferation of narrow and simultaneously applicable micro-agreements, each denominated a "collective bargaining agreement," and each negotiated in isolation, without necessary reference to any underlying primary agreement. Indeed, under the logic of that approach, there need *be* no primary agreement of any kind, and therefore no central "term" that could even give meaning to the locution "midterm bargaining."

Congress did not seek to diminish the role of comprehensive labor contracts in this context, and it therefore did not

adopt NFFE's idiosyncratic definition of "collective bargaining agreement." That term denotes a basic labor contract governing the various rights and responsibilities of the parties for a period of years. As in the private sector, the product of any subsequent issue-specific negotiation during the contractual term would *supplement* the underlying collective bargaining agreement, but would not itself constitute a new "collective bargaining agreement" in its own right.[4]

NFFE argues (Br. 14-15), however, that Congress unhinged that term from standard usage when, in Section 7103(a)(8), it defined "collective bargaining agreement" to mean "an agreement entered into as a result of collective bargaining pursuant to the provisions of this chapter." 5 U.S.C. 7103(a)(8). That argument, however, simply assumes an incorrect answer to a question that Section 7103(a)(8) does not purport to resolve: what kind of "agreement * * * the provisions of this chapter" compel the parties to reach.[5]

---

[4] See generally 29 U.S.C. 158(d) (provision of NLRA addressing midterm "modification" of underlying agreement); *NLRB* v. *Bildisco & Bildisco*, 465 U.S. 513, 519 (1984) (noting that Section 8(d) of NLRA "establishe[s] detailed guidelines for midterm modification of collective bargaining agreements"); B. Duke, Note, *Regulating the Internal Labor Market*, 93 Colum. L. Rev. 932, 933 n.8 (1993) ("'Endterm' bargaining takes place in the negotiations over an initial agreement and over renewal of an agreement on its expiration. 'Midterm' bargaining refers to labor-management negotiations that occur during the life of an existing collective-bargaining agreement."); *Webster's Third New International Dictionary* 445 (1986) (defining "collective agreement" as "an agreement between an employer and a union usu. reached through collective bargaining and establishing wage rates, hours of labor, *and* working conditions") (emphasis added).

[5] The Statute defines "collective bargaining" itself more narrowly than does the NLRA (see p. 12, *supra*), limiting the term to whatever "mutual obligation" the Statute elsewhere imposes to "bargain in a good-faith effort to reach agreement with respect to the conditions of employment." 5 U.S.C. 7103(a)(12). That language anticipates that the parties will meet to negotiate "the conditions of employment" (*ibid.*) as part of a

Moreover, NFFE's understanding of the term "collective bargaining agreement" conflicts with the use of that term in related statutory provisions, which presuppose that, after such an agreement is reached, any further negotiation would "amend" the agreement but would not render it simply one "collective bargaining agreement" among many. See, *e.g.*, 5 U.S.C. 7118(a)(7)(B) (upon finding of unfair labor practice, FLRA shall compel parties to "renegotiate" collective bargaining agreement and require "that the agreement, as amended, be given retroactive effect"); 5 U.S.C. 7111(f)(3) (forbidding recognition of one union if "there is then in effect a lawful written collective bargaining agreement" between agency and another union, unless "the collective bargaining agreement has been in effect for more than 3 years"); cf. note 10, *infra* (discussing 5 U.S.C. 7131(a)). Indeed, the FLRA has itself determined that, "for an agreement to constitute a 'collective bargaining agreement' within the meaning of section 7111(f)(3) that can bar the filing of a petition for exclusive recognition, an agreement must contain substantial terms and conditions of employment sufficient to stabilize the bargaining relationship between the parties to the agreement." *Department of Health & Human Servs., Social Security Admin.*, 44 F.L.R.A. 230, 239 (1992). That definition contradicts the one that NFFE proposes here, which would embrace every product of bargaining, no matter how narrow in scope.

In short, Congress used the term "collective bargaining agreement" in Section 7114(a)(4) exactly as that term has been used in labor law throughout this century: to denote a

---

package, not to negotiate a small subset of conditions in each of a potentially unlimited number of micro-agreements. In any event, although petitioners sometimes suggest otherwise (*e.g.*, FLRA Br. 19), Section 7103(a)(12)'s general definition of "collective bargaining" cannot be construed to *expand* Section 7114(a)(4)'s limited duty to "negotiate * * * for the purposes of arriving at a *collective bargaining agreement*."

comprehensive term contract between an employer and a union. Because Section 7114(a)(4) obligates an agency employer only to "negotiate * * * for the purposes of *arriving at* a collective bargaining agreement" (emphasis added), it excludes any further obligation to negotiate for purposes of supplementing such an agreement during a bargaining term at a union's initiative. If Congress had intended to impose that additional obligation, it would have written Section 7114(a)(4) to resemble the corresponding provisions of the NLRA; its refusal to do so marks a deliberate policy choice, as we discuss below. See pp. 22-33, *infra*.[6]

Finally, the same conclusion follows from Congress's conspicuous omission of any explicit restriction on public-sector midterm bargaining similar to the restriction (for matters covered by an existing contract) that, in the 1947 amendments, Congress found necessary to add in Section 8(d) of the NLRA, 29 U.S.C. 158(d). See pp. 12-13, *supra*. As the Fourth Circuit observed, it is "inconceivable that Congress would have omitted the § 8(d) limitation on midterm bargaining had Congress in fact intended [the Statute] to require such bargaining in the first place." *SSA*, 956 F.2d at 1287.

---

[6] Amici AFL-CIO et al. (Br. 10, 16), but not petitioners, would alternatively read a midterm bargaining right into 5 U.S.C. 7102(2). That provision is completely inapposite. Section 7102 is an introductory provision that generally authorizes "[e]ach employee" of the federal government "to act for a labor organization in the capacity of a representative" and "to engage in collective bargaining with respect to conditions of employment through representatives chosen by employees under this chapter." The question here, however, is not whether federal employees are authorized to engage in collective bargaining as a general matter, but when and in what form they may exercise that right. As both the FLRA and petitioner NFFE recognize, the relevant answer to that question is found in Section 7114(a), not in Section 7102. Indeed, the FLRA and NFFE do not even cite the latter provision, much less rely upon it.

In one passage, the FLRA tries to explain that omission by "speculat[ing] that the absence of language in the Statute comparable to the section 8(d) exception signaled Congress's intent to permit unrestricted midterm bargaining." FLRA Br. 32. Two pages later, however, the FLRA rejects its own speculation, acknowledging, as does petitioner NFFE, that allowing such "unrestricted" midterm bargaining would be "arguably at odds with the stated purposes of the Statute." *Id.* at 34; accord NFFE Br. 23 (contending that a midterm bargaining exception for matters covered by an existing contract is so "fundamental" that "Congress did not spell it out in the [Statute]," even though Congress did perceive a need to spell it out in the NLRA); see also *SSA*, 956 F.2d at 1287. Because Congress deemed it essential to include an explicit Section 8(d) exception in the NLRA, the natural explanation for the omission of any corresponding exception in the Statute is that Congress decided against creating any general right to public-sector midterm bargaining in the first place.[7]

3. The specificity with which Section 7114(a)(4) confines the bargaining duty to negotiations "for the purposes of arriving at a collective bargaining agreement," and the striking contrast between that provision and the corresponding language of the NLRA, provide the key to deciding this case. Congress was not "silent" (FLRA Br. 19) on the subject of

---

[7] The FLRA defends its "authority" (Br. 33-34) to carve an exception out of the unrestricted midterm bargaining obligation that its position would otherwise create. We agree that the FLRA would have (and would need to exercise) such authority *if* Congress had created an unrestricted midterm bargaining right. See generally *Department of the Navy* v. *FLRA*, 962 F.2d 48 (D.C. Cir. 1992). The question here, however, is not whether the FLRA would have such authority if its position in this case were valid. The question is instead what the striking discrepancy between the Statute and the NLRA reveals about Congress's intent on an antecedent issue: whether the Statute excludes any general duty of midterm bargaining.

midterm bargaining. Instead, it spoke directly to that issue, and it deliberately excluded midterm bargaining from the structure of public-sector labor-management relations, except where an agency makes midterm changes to the conditions of employment. That exception itself supports the same conclusion.

The only provision in the Statute that expressly authorizes midterm bargaining is Section 7106, entitled "Management rights." In that section, Congress reserved to agency management the authority to take certain unilateral actions that could alter the conditions of employment during the term of a collective bargaining agreement. 5 U.S.C. 7106(a). It provided for mandatory negotiations, which would necessarily occur midterm on many occasions, concerning "procedures which management officials of the agency will observe in exercising any authority" under Section 7106 as well as "appropriate arrangements for employees adversely affected by the exercise of any [such] authority." 5 U.S.C. 7106(b)(2) and (3). As the Fourth Circuit observed, "[w]hen Congress did require midterm bargaining, it thus spelled out the context in which such bargaining was to take place. The inclusion of a specific duty of midterm effects bargaining, therefore, suggests the inadvisability of reading a more general duty into the statute." *SSA*, 956 F.2d at 1284.

In response, the FLRA argues principally (Br. 22-23) that Section 7106(b) is not itself a source of any bargaining obligation, and that any such obligation must therefore derive from some other provision, which the FLRA identifies as Section 7114. That is incorrect. The courts have long identified Section 7106(b) as the source of an agency's duty to bargain when it makes unilateral changes to the conditions of employment, see, *e.g.*, *IRS* v. *FLRA*, 717 F.2d 1174, 1176 (7th Cir. 1983) ("Sections 7106(b)(2) and (3) impose an obligation to bargain over the impact and implementation of [management] decisions"); *AFGE, Local 2782* v. *FLRA*, 702 F.2d 1183, 1186-1188 (D.C. Cir. 1983) (Scalia, J.), and the FLRA's

own decisions support the same conclusion.[8] That conclusion is also solidly rooted in the text of Section 7106(b). Whereas Section 7106(b)(1) commits certain topics of negotiation to "the election of the agency," neither Section 7106(b)(2) nor Section 7106(b)(3) contains any phrase conferring such discretion, and Congress intended to "ma[k]e clear by the absence of the phrase" in the latter two provisions that the limited bargaining obligations *they* impose are "mandatory." *AFGE, Local 2782*, 702 F.2d at 1188 (quoting 124 Cong. Rec. 38,715 (1978) (statement of Rep. Ford)). Finally, as we discuss below (at pp. 33-37), a review of both the legislative history of the Statute and the preenactment administrative practice confirms that Congress intended to impose midterm bargaining obligations on employers *only* when they make midterm changes to the conditions of employment.[9]

---

[8] See, *e.g.*, *AFGE, Local 3354*, No. O-NG-2407, 1998 WL 598537, at *4 (FLRA Aug. 31, 1998) (addressing criteria for "determining whether a proposal is *within the duty to bargain under section 7106(b)(3)*") (emphasis added); *AFGE, Local 163*, F.L.R.A. 1063, 1065-1066 (1997) (same); *Government Printing Office*, 13 F.L.R.A. 203, 204-205 & n.3 (1983) (finding it unnecessary to "distinguish between the nature of the *bargaining obligations arising under section 7106(b)(2) and (3)*," but nonetheless upholding ALJ determination that agency committed unfair labor practice by acting "in derogation of [its] *obligation under Section 7106(b)(3) and (2)*") (emphasis added).

[9] If Section 7106(b) did not create such a midterm bargaining duty, Section 7114(a)(4) would still mean just what it says. Because the latter provision mandates negotiations only "for the purposes of *arriving at* a collective bargaining agreement," it could not fill the gap that petitioners' erroneous interpretation of Section 7106(b) would create for mandatory *midterm* bargaining over issues related to changes in the conditions of employment. Petitioners might seek to fill that gap with a principle that, except as provided by Section 7106, an agency employer commits an unfair labor practice if it makes material midterm changes to the conditions of employment without first negotiating with the union. Cf. 5 U.S.C. 7116(a)(5). But that principle could not begin to support what petitioners seek here: open-ended midterm bargaining rights unconnected to any workplace change.

B. The FLRA's Position Contradicts The Core Statutory Objective Of Ensuring "An Effective And Efficient Government"

It is no accident that the provisions of the Statute diverge sharply from those of the NLRA on precisely the question presented here. Congress could foresee that union-initiated midterm bargaining, if permitted, would be both more common and more wasteful in the public sector than in the private, and that the availability of such bargaining would threaten the central objective of this statutory scheme: "an effective and efficient Government." 5 U.S.C. 7101(b). The FLRA's position here thus contradicts not just the plain language of Section 7114(a)(4), but that central statutory objective as well.

1. In the private sector, collective bargaining is characterized not by binding arbitration, but by "[t]he presence of economic weapons in reserve, and their actual exercise on occasion by the parties." *Insurance Agents' Int'l Union*, 361 U.S. at 489. The National Labor Relations Board may compel parties to bargain in good faith, but it generally may not exercise "governmental power to regulate the substantive solution of their differences." *Id.* at 488. That legal regime has important consequences for the dynamics of private-sector collective bargaining. "In the private sector, once an impasse is reached, the union's alternative is often to strike—a drastic measure that is unlikely to be utilized midterm because all issues worthy of such action typically are resolved by the basic collective bargaining agreement." *SSA*, 956 F.2d at 1287. For that reason, even proponents of union-initiated midterm bargaining in the public sector have acknowledged that such bargaining "has not played a noticeable role" in the private sector. F. Ferris, *Union-Initiated Mid-Term Bargaining: A Catalyst in Reshaping Conflict Patterns*, 5 Negotiation J. 407, 408 (Oct. 1989) (*Catalyst*).

Public-sector bargaining is governed by different rules, and it is therefore subject to vastly different dynamics. On

the one hand, federal employees are forbidden to threaten the use of economic weapons to break a bargaining impasse: specifically, they may not "call, or participate in, a strike, work stoppage, or slowdown." 5 U.S.C. 7116(b)(7). On the other hand, public-sector unions are entitled to an alternative remedy that their private-sector counterparts might only dream about: they may subject employers to compulsory dispute resolution, including binding arbitration. See 5 U.S.C. 7119(c)(5). Such arbitration is conducted by the Federal Service Impasses Panel, a subagency of the FLRA. See 5 U.S.C. 7119(b)(1) and (c)(1). The Impasses Panel may "take whatever action is necessary and not inconsistent with [the Statute] to resolve the impasse"—and, in particular, it may impose any or all of the union's substantive proposals on the agency employer. 5 U.S.C. 7119(c)(5)(B)(iii).

Thus, in the public sector, unlike the private, a union need not marshal any particular degree of support from rank-and-file employees to ensure full consideration of its bargaining proposals. Instead, it may simply move upon impasse to binding arbitration for any given proposal. Because such "arbitration—unlike striking—is relatively costless for a union to invoke, many more midterm negotiations would be expected in the public sector than the private sector." *SSA*, 956 F.2d at 1287. Petitioners do not seriously contest that point. Indeed, as explained by the long-time director of negotiations for the National Treasury Employees Union (NTEU), recognition of a general midterm bargaining right has "far more impact in the federal sector than the private sector," because the "bargaining power" of a public-sector union "does not depend on building support for a mid-contract strike" but is instead "merely a function of a legal process the union can invoke without cost." *Catalyst*, *supra*, at 409.

That is one reason why, as the FLRA itself determined in *IRS I* (see pp. 3-4, *supra*), the midterm bargaining rights sought here "would encourage dispersal of the collective bar-

gaining process," generate "continuous bargaining on an issue-by-issue basis," and undermine "the ability of the parties to rely upon [term] agreements as a stable foundation for their day-to-day relations." 17 F.L.R.A. at 736-737. But that is not the only reason. Another, related factor is the peculiar nature of the bargaining issues that arise in the public sector.

Private-sector negotiations typically focus on wages, hours, economic benefits, and job security. Private-sector employees both wish for and count on term contracts to settle those issues for a period of years. In the public sector, by contrast, those core issues are generally beyond the scope of collective bargaining and are addressed instead by statute or government-wide regulations. See, *e.g.*, 5 U.S.C. 5331 *et seq.*; 5 U.S.C. 5341 *et seq.*; 5 U.S.C. 6101 *et seq.*; 5 U.S.C. 7501 *et seq.*; see generally *Fort Stewart Schools* v. *FLRA*, 495 U.S. 641, 649 (1990). As a result, public-sector unions focus on other issues that are generally not integral to an employee's wages or job security and therefore need not be secured by a comprehensive term contract. In the words of the NTEU official quoted above, such unions must "tend to a variety of smaller issues that have narrower constituencies. In fact, few issues can be ignored lest substantial groups be alienated from the union. The union must seize virtually every issue in order to attract members and survive." *Catalyst*, *supra*, at 409. Because these "smaller" issues do not relate to core concerns about wages and job security, and because employees therefore have no compelling reason to demand resolution of them in one comprehensive term contract, the process of negotiating (and perhaps arbitrating) "virtually every issue" to satisfy a union's many "narrow[] constituencies" would be prolonged and diffuse if the union could make liberal use of midterm bargaining rights.

One final difference between public- and private-sector negotiations warrants mention. "That private-sector unions must incur the expenses entailed in negotiations" in the ab-

sence of a contrary arrangement with management "gives them a strong incentive to join with management in structuring the negotiating process in a manner least disruptive and costly to both the employer and the union." *SSA*, 956 F.2d at 1288; cf. 29 U.S.C. 186(c)(1). The costs of public-sector bargaining, however, are largely borne not by unions or employees, but by taxpayers. See, *e.g.*, 5 U.S.C. 7131(a) (authorizing "official time" for "negotiation of a collective bargaining agreement," including "attendance at impasse proceeding," by employees who "otherwise would be in a duty status").[10] A public-sector union therefore has little cost incentive to choose efficient, consolidated negotiations over inefficient, piecemeal negotiations. See *SSA*, 956 F.2d at 1288.

2. For all of those reasons, the FLRA was originally correct when, in *IRS I*, it found that the midterm bargaining policy at issue here "would inject uncertainty into the parties' relationship, enhance the prospect for protracted conflict, and could lead to the continuous expenditure of resources for both management and exclusive representatives." 17 F.L.R.A. at 737. But the costs of that policy are not merely procedural. The policy also has the potential to distort the *substantive* resolution of public-sector labor disputes.

---

[10] Petitioner NFFE construes the term "collective bargaining agreement" in Section 7131(a) to include midterm bargaining and cites two court of appeals cases addressing the FLRA's varying interpretations of that provision. See NFFE Br. 16 (citing *Bureau of Alcohol, Tobacco & Firearms* v. *FLRA*, 672 F.2d 732, 736-737 (9th Cir. 1982) (addressing availability of official time for midterm bargaining), rev'd in part on other grounds, 464 U.S. 89 (1983); *AFGE* v. *FLRA*, 750 F.2d 143 (D.C. Cir. 1984) (addressing availability of official time for negotiation of "local" agreements)). This case does not directly involve Section 7131(a), nor, of course, would resolution of the issue presented here have any bearing on an employee's ability to be granted official time under some other provision. See, *e.g.*, 5 U.S.C. 7131(d).

As the Fourth Circuit explained in *SSA*, "the very essence of bargaining is compromise and concession. By withholding a particular proposal during the negotiations over the basic agreement, a union avoids the necessity of making a concession to the agency in order to achieve agency acceptance of the proposal, but it keeps alive the possibility of obtaining the proposal through subsequent imposition by [Impasses Panel] arbitration." 956 F.2d at 1287. As a result, "by arbitrating a string of unrelated proposals piecemeal rather than in the context of negotiations toward a basic agreement, a union may be able to achieve an overall set of arbitration-enforced concessions that exceeds both what it could have obtained through one set of unified negotiations leading to a basic agreement and what an arbitrator would have awarded had all issues been arbitrated together." *Ibid.*

The prospect of that substantive advantage itself, of course, further reinforces a union's incentive to deemphasize the role of comprehensive term agreements in favor of seriatim micro-agreements on individual issues. That is not just a speculative concern. NTEU's director of negotiations explains in some detail how public-sector unions try to implement this strategy in practice:

> Although [compromise] is the "way of life" in American negotiations, it is not ideal[.] * * * Now, however, the union need not suffer as much from a trade-off strategy. As a result of [the D.C. Circuit's decision in *NTEU*], a union can decide to withhold a matter from its term contract proposals when it knows the issue will be compromised away if bargained with many other matters. *The union can hold the matter off until the term agreement is done and then initiate the proposal as part of a single-issue negotiation where it is not as likely to suffer from a tradeoff among issues.* The union could even put forth the proposal as part of the term agreement demands, but then pull it off the table with the statement

> that it reserves the right to raise it later during the life of the term agreement.

Catalyst, *supra*, at 411-412 (emphasis added). Moreover, as the same union official observes, union-initiated midterm bargaining rights could even deter agency employers from exercising their statutory prerogative (which Congress added to protect the efficient execution of an agency's mission) "to initiate changes in working conditions during the life of an agreement." *Catalyst*, *supra*, at 413-414 & n.16 (discussing 5 U.S.C. 7106, the "Management rights" provision discussed at pp. 19-21, *supra*). That is so, he writes, because, "[i]n a face-to-face power clash, the union could easily promise the employer that for every change the employer proposed, the union would put forth two." *Catalyst*, *supra*, at 413-414. As the FLRA recognized with some understatement in *IRS I*, "[i]t is difficult to envision that Congress, with its interest in the achievement of effective and efficient Government," would ever have intended to create such a regime. 17 F.L.R.A. at 737.

3. Petitioners argue that the midterm bargaining rights they have asked this Court to reinstate on a nationwide basis would not have the important consequences that public-sector unions and the FLRA itself have foreseen. In particular, they argue that recognition of those rights would not, as the FLRA once warned, threaten "dispersal of the collective bargaining process" and "the continuous expenditure of resources," *IRS I*, 17 F.L.R.A. at 736-737; and that recognition of such rights would not, as NTEU's chief negotiator expects, "have far more impact in the federal sector than the private sector" as each union "seize[s] virtually every issue in order to attract members and survive," *Catalyst*, *supra*, 409.

The FLRA relies on the hypothetical availability of "zipper" clauses: provisions "through which unions contractually agree to generally waive their right to initiate midterm bar-

gaining." Br. 36. But there is no reason to believe that unions would in fact "contractually agree" to negotiate away the rights that the FLRA would grant them. To begin with, neither the FLRA nor any court has even resolved whether unions could *ever* be forced upon impasse to accept such waivers. See FLRA Br. 36 n.16 ("the Authority has not had that specific question before it").[11] One union official has argued that, "because the right to initiate mid-term bargaining is a statutory right, the [Impasses Panel], which arbitrates all bargaining disputes, cannot force a union to forfeit it as part of an * * * arbitration award. The union must give it up voluntarily." *Catalyst*, *supra*, at 410-411 (footnote omitted).[12] In any event, even if that view is wrong, and even if

---

[11] Two D.C. Circuit judges have expressed the view that "zipper" clauses are mandatory subjects of bargaining that may be negotiated to impasse. See *FLRA* v. *IRS*, 838 F.2d 567, 568-570 (D.C. Cir. 1988) (Edwards, J., concurring in the denial of rehearing en banc). It is noteworthy, however, that neither petitioner in this case actually embraces that position or the related proposition that "zipper" clauses could ever be imposed upon impasse. See FLRA Br. 36 & n.16; NFFE Br. 24 n.11. Moreover, the FLRA is mistaken in claiming (Br. at 8) that the two judges at issue "endorsed" the midterm bargaining policy at issue here; instead, those judges simply summarized the panel decision in *NTEU* and expressed disagreement with a particular policy argument for reviewing that decision en banc. See 838 F.2d at 568-570. In fact, in his subsequent opinion for the court in *Department of the Navy*, *supra*, Judge Edwards repeatedly affirmed many of the Fourth Circuit's policy concerns in *SSA*, see 962 F.2d at 54 & n.3, 55 & n.6, 59 & n.12, while noting only that the panel was "bound by the result reached in *NTEU*," *id.* at 54 n.3.

[12] Indeed, the only circumstance in which unions would have any incentive to give up such rights "voluntarily" is where they could use the threat of wasteful and repetitive bargaining *itself* as leverage to win major substantive concessions from agency employers. NTEU's long-time negotiator has expressed confidence that a "union can demand a very high price if it wishes to treat this right as a dispensable chip." *Catalyst*, *supra*, at 411; see also *id.* at 414 ("the union could easily promise the employer that for every change the employer proposed, the union would put forth two"). But if Congress had wanted to give public-sector unions

unions could theoretically be compelled to accept "zipper" clauses in their contracts, there is no reason to believe that the Impasses Panel would often impose such clauses on non-consenting unions. To the contrary, the FLRA's enthusiastic approval of midterm bargaining, as expressed in this case, strongly suggests that neither it nor its subagency would regularly foreclose a union's ability to take advantage of the midterm bargaining opportunities at issue here.

The FLRA also contends that any inefficiencies of midterm bargaining would be limited by that agency's recently clarified rule (see FLRA Br. 35 n.15; see also pp. 18-19, *supra*) that "[t]he obligation to bargain midterm extends only to matters not contained in or covered by the term agreement." FLRA Br. 35; see generally *Department of the Navy* v. *FLRA*, 962 F.2d 48 (D.C. Cir. 1992); *Department of Health & Human Servs., Social Security Admin.*, 47 F.L.R.A. 1004, 1018 (1993) (*HHS/SSA*). Although that rule would place *some* limits on midterm bargaining, it would nonetheless leave room for broad midterm supplementation of any collective bargaining agreement. Just as important, so long as the FLRA's expansive midterm bargaining policy remains in effect, the agency's "contained in or covered by" rule may itself give union negotiators another powerful incentive to *withhold* issues from the bargaining table during the negotiation of term agreements precisely so that they may preserve those issues for future midterm bargaining. See generally *Catalyst*, *supra*, at 411-412.

Moreover, although the FLRA suggests that management can somehow "protect itself against an extended midterm bargaining obligation by ensuring that the term agreement

---

even more leverage in the federal workplace than this statute already gives them, it would have done so rationally and directly. It would not have given those unions a "dispensable chip" that, if left untraded, would impose substantial costs on the public fisc and impair the efficiency of public-sector bargaining.

is comprehensive in scope" (Br. 35), agency employers could not possibly foresee, much less resolve, the "variety of smaller issues" that public-sector unions would subsequently raise during a contractual term to satisfy their many "narrow[] constituencies." *Catalyst*, *supra*, at 409. And, even if an employer *could* foresee all such issues, it generally could not prevent midterm bargaining about any given one of them unless it could persuade the union to cooperate in specifically addressing the issue in term negotiations. See FLRA Br. 35-36 & n.15. That may prove difficult if unions follow the lead of one prominent negotiator and "pull [an issue] issue off the table" while "reserv[ing] the right to raise it later during the life of the term agreement." *Catalyst*, *supra*, at 412. And, although "the services of the Impasses Panel can be invoked" (FLRA Br. 36), the Panel could be expected to continue resolving disputes about the availability of midterm bargaining just as it has resolved them in the past: by including broad midterm bargaining clauses in term contracts. See *Department of Energy* v. *FLRA*, 106 F.3d 1158 (4th Cir. 1997) (*DOE*); see also note 16, *infra*.

Finally, even apart from the many substantive concerns about the FLRA's policy, that policy indisputably encourages considerable litigation about whether any given issue raised in midterm bargaining satisfies the newly revised—and highly indeterminate—"contained in or covered by" test. See FLRA Br. 35 n.15. As the FLRA itself admits, "it will be difficult" in a range of cases "to determine whether the matter sought to be bargained [midterm] is, in fact, an aspect of matters already negotiated" in an underlying term agreement. *HHS/SSA*, 47 F.L.R.A. at 1018; see also *id.* at 1019 (inquiry requires factfinder to "examine all record evidence"). Such litigation would only exacerbate the

already considerable transaction costs of public-sector labor disputes.[13]

4. Petitioner NFFE suggests (Br. 28-29) both that the Statute imposes symmetrical obligations on agencies and unions and that there is something asymmetrical about the regime that the FLRA originally adopted in *IRS I*. Each of those propositions is incorrect. First, as this Court has emphasized, the Statute does not "confer on the FLRA an unconstrained authority to equalize the economic positions of union and management." *BATF*, 464 U.S. at 108. As a general matter, other provisions of federal law address the most important issues related to the "economic position" of federal employees, such as wages and job security. See p. 24, *supra*.

---

[13] Petitioner NFFE claims that midterm bargaining has not yet revolutionized public-sector labor negotiations. See NFFE Br. 26 & n.13. That claim is flawed on several levels. *First*, its empirical basis is NFFE's own failure to locate an overwhelming number of reported decisions by the Impasses Panel involving arbitrations of unresolved midterm bargaining disputes initiated by unions. *Ibid.* That is no basis at all: such decisions often do not specify that a given dispute arose from midterm bargaining rather than from a disputed portion of the negotiations for a basic collective bargaining agreement. *Second*, it is the *threat* of compulsory arbitration by the Impasses Panel that magnifies the importance of midterm bargaining in the public sector; that threat need not be realized in each case for the FLRA's midterm bargaining policy to have significant harmful consequences in all cases. See, *e.g.*, *Catalyst*, *supra* at 414 (prospect of midterm bargaining would deter agencies from exercising statutory rights because "the union could easily promise the employer that for every change the employer proposed, the union would put forth two"). *Third*, the Fourth Circuit's 1992 decision in *SSA* has placed the FLRA's midterm bargaining policy in doubt for the past six years; petitioners sought certiorari here precisely to remove the practical constraints that *SSA* and its progeny have placed on greater proliferation of such bargaining. *Finally*, and in any event, the underlying question presented here is what Congress intended, and might reasonably have foreseen, in 1978 when it enacted Section 7114(a)(4) of the Statute. The details of subsequent empirical developments have no direct bearing on that inquiry.

The ultimate objective of *this* Statute, therefore, is not absolute symmetry in the bargaining relations of the parties, but the use of collective bargaining to the extent—and only to the extent—that it promotes "the public interest" and, in particular, "an effective and efficient Government." 5 U.S.C. 7101(a) and (b). The midterm bargaining policy at issue here would unmoor public-sector collective bargaining from that underlying statutory objective.

In any event, the regime that Congress created—the same regime that the FLRA originally adopted in *IRS I*—is, in fact, entirely equitable as between the parties to collective bargaining. Under any reading of this statute, Congress entitled agencies to make certain midterm changes to the conditions of employment to ensure the successful execution of their substantive missions; if agencies could not make such changes, they could not effectively serve the public interest, which is their reason for existing. Nonetheless, the agency must notify the union of such changes and, upon invitation, bargain about issues related to them. That bargaining duty rests exclusively on the agency. To the extent, therefore, that a correct reading of this statute produces an asymmetrical result in bargaining obligations, the asymmetry favors the unions.

Petitioner NFFE separately argues (Br. 27) that the creation of plenary midterm bargaining rights is necessary to ensure a prompt and satisfactory response to "unanticipated matters" that occur during the term of a collective bargaining agreement, such as the discovery of radon in the workplace or "outbreaks of Legionnaire's disease." That argument is flawed in several respects. First, the policy concern that NFFE raises here—accommodation of midterm exigencies—is much narrower than, and bears no logical relation to, the scope of the midterm bargaining rule it seeks. That rule would compel employers to engage in midterm bargaining whenever a union raises an issue that is not "contained in or covered by" the existing collective bargaining agreement,

even in the many circumstances in which the issue could have been negotiated at the time the agreement was reached. The lack of any logical connection between NFFE's policy arguments and its litigating objective here shows that its remedy, if one were warranted, would lie with Congress: in a narrowly tailored legislative adjustment to an employer's existing obligation to negotiate only "for the purposes of arriving at a collective bargaining agreement." 5 U.S.C. 7114(a)(4).

In any event, NFFE's concern about workplace contingencies fails even on its own terms. First, federal agencies do not ignore "life-threatening health hazards in the workplace" (NFFE Br. 27); they fix them. See, *e.g.*, 29 U.S.C. 668(a)(1) (requiring agencies, "after consultation with representatives of the employees," to "provide safe and healthful places and conditions of employment"). Issues relating to those remedial measures would be subject to negotiation, whether at the beginning of a new collective bargaining term or, just as important, upon invocation of the specific midterm bargaining rights guaranteed by Section 7106(b)(2) and (3). See pp. 19-21, *supra*; see also 5 U.S.C. 7106(a)(1) and (a)(2)(D). Those existing bargaining rights are entirely sufficient to give federal employees a substantial voice in resolving workplace exigencies. In any event, nothing prevents the parties from anticipating workplace contingencies, and settling upon specific solutions for those contingencies, during negotiations for a given term agreement.

C. The FLRA's Position Contradicts The Legislative History And Prior Administrative Practice

The FLRA's current midterm bargaining policy conflicts not only with specific provisions of the statutory text and with the Statute's explicit and overarching objective of governmental efficiency, see 5 U.S.C. 7101(b), but also with the Statute's legislative history and with longstanding administrative practice.

In interpreting the Statute, this Court has placed particular reliance on the regulatory regime governed by Executive Order No. 11,491, 5 U.S.C. 7101 note, which comprehensively addressed public-sector bargaining in the years before enactment of the Statute. See *BATF*, 464 U.S. at 100-103. Although the FLRA is not "bound by administrative decisions made under the Executive Order regime," the Statute in many respects "constitutes a strong congressional endorsement of the policy on which the federal labor relations program had been based since its creation in 1962," and it "does not reflect a dramatic departure from the principles of [that] Executive Order regime." *Id.* at 103 & n.13. In the words of one congressional sponsor, "[w]hat we really do [in enacting the Statute] is to codify the 1962 action of President Kennedy in setting up a basic framework of collective bargaining for Federal employees." *Id.* at 103 (quoting 124 Cong. Rec. 29,182 (1978) (remarks of Rep. Udall)); see also 124 Cong. Rec. 28,796 (1978) (remarks of Rep. Ford) ("I wish that I could say to my friends in organized labor that what we have constructed here is a monumental new breakthrough for the future of public employee collective bargaining, but that would not be true."); 5 U.S.C. 7135(b) (generally preserving Executive Order regime unless superseded by specific provisions).

As the FLRA itself determined in *IRS I*, several years after enactment of the Statute, "an obligation to negotiate union initiated mid-term bargaining proposals *did not exist under the Executive Order.*" 17 F.L.R.A. at 736-737 n.7 (emphasis added). The FLRA further observed that, under the Executive Order regime, an agency employer was (as it is now) obligated to bargain during the term of a collective bargaining agreement where the employer "'chang[es] established personnel policies and practices and matters affecting working conditions during the term of an existing agreement.'" *Id.* at 736 n.7 (quoting Federal Labor Relations Council, *Report and Recommendation on the*

Amendment of Executive Order 11491, as amended (*FLRC Report*), *reprinted in Labor-Management Relations in the Federal Service* 41 (1975)).[14] In contrast, the FLRA explained, where a union had claimed the broader midterm bargaining rights at issue here, the claim was rejected because, *inter alia*, the Executive Order did not compel the employer "'to bargain over changes proposed or requested by the Union during the term of the contract and d[id] not give the exclusive representative any right to demand such bargaining.'" *Id.* at 736-737 n.7 (quoting *Army & Air Force Exchange Service*, Case No. 22-6657 (CA), 2 *Rulings on Request for Review* 561 (1976)).

If Congress had intended the Statute to reverse that long-standing practice, it would have made that intention clear. In any event, it would not have chosen the language it did choose, which, under any reasonable interpretation, *reaffirms* that long standing practice. Although the FLRA itself has never repudiated its historical findings in *IRS I* (see *SSA*, 956 F.2d at 1286; cf. FLRA Br. 28 n.12), the FLRA's appellate counsel now claim (Br. 26-27) that "authoritative support is lacking" for those findings and that this Court should disregard *Army & Air Force Exchange Service* because it was only a "single unreviewed decision." But the FLRA's appellate counsel has cited no authority at all from

---

[14] As the FLRA indicated in *IRS I* (17 F.L.R.A. at 736 n.7), that passage in the FLRC Report addresses the narrow obligation of employers to bargain over midterm changes to the conditions of employment. Despite the contrary suggestion of amici AFL-CIO et al. (Br. 23), the omission of a specific reference to the general midterm bargaining rights sought here is, if anything, additional evidence that the FLRA's current position is wrong. Amici's separate reference (*ibid.*) to a passage in *Department of Transp., FAA*, A/SLMR No. 517, 5 A/SLMR 344 (1975), is also unavailing. That passage did not address midterm bargaining, but rather whether an arbitration award (regarding parking) was superseded by the subsequent signing of a new basic collective bargaining agreement (which did not address the subject of the arbitration award).

the Executive Order regime to support the FLRA's current position. The most reasonable conclusion is that the issue was rarely litigated because the FLRA was right the first time—the midterm bargaining rights at issue here "did not exist under the Executive Order" (17 F.L.R.A. at 737 n.7)—and unions did not seek to challenge that understanding.

Finally, the FLRA's current position is inconsistent with the only directly relevant passage in the Statute's own legislative history. The Senate Report accompanying the Senate version of the statute explained:

> [The bill] provides that the agency and the labor organization shall negotiate in good faith for the purpose of arriving at an agreement. The parties have a mutual duty to bargain not only with respect to *those changes in estabished personnel policies proposed by management*, but also concerning negotiable proposals initiated by either the agency or the exclusive representative in the context of *negotiations leading to a basic collective bargaining agreement.* Where agency management proposes to change established personnel policies, the exclusive representative must be given notice of the proposed changes and an opportunity to negotiate over such proposals to the extent they are negotiable.

S. Rep. No. 969, 95th Cong., 2d Sess. 104 (1978) (emphasis added). There is nothing "ambiguous" (FLRA Br. 25) about this passage. It specifically describes the two circumstances in which an agency employer's bargaining duty arises: where management makes "changes" to the conditions of employment, and in "negotiations leading up to a basic collective bargaining agreement." Not by coincidence, those are precisely the (only) two circumstances in which the Statute itself, under the FLRA's correct interpretation in *IRS I*, imposes a bargaining duty on employers. See pp. 11-21, *supra*. Although Congress chose the House version of the

statute, "the Senate version * * * and the version ultimately adopted did not differ substantively with respect to either the nature or the timing of an agency's duty to negotiate." *SSA*, 956 F.2d at 1285 (discussing legislative history). The two versions differed instead on the *substance* of an employer's bargaining obligation. See *ibid.* The Senate report is thus a highly relevant indication of Congress's background assumptions in enacting the Statute.

D. The FLRA's Position Is Not Entitled To *Chevron* Deference

As demonstrated above, the FLRA's position on midterm bargaining contradicts the statutory text, the Statute's overarching purpose of promoting efficiency in government, prior practice under the Executive Order regime, and the only probative evidence appearing in the legislative history. In short, "the intent of Congress is clear," and "that is the end of the matter." *Chevron U.S.A. Inc.* v. *Natural Resources Defense Council, Inc.*, 467 U.S. 837, 842 (1984). But even if there were some ambiguity about that intent, the FLRA's approach would not be entitled to deference.

First, the FLRA's approach is inconsistent with the Statute's own explicit rule of construction. Section 7101(b) provides that "[t]he provisions of this [Statute] should be interpreted in a manner consistent with the requirement of an effective and efficient Government." 5 U.S.C. 7101(b). The FLRA is not entitled to deference when it construes a provision of the Statute in a manner directly inconsistent with that statutory objective. See, *e.g.*, *HHS* v. *FLRA*, 844 F.2d 1087, 1090 (4th Cir. 1988) (en banc). As discussed, that is what the FLRA has done here.[15] The *Chevron* principle em-

---

[15] Indeed, in one passage of its brief, the FLRA itself appears to suggest that questions of "effectiveness and efficiency" should play little role in the development of its midterm bargaining policy. Cf. FLRA Br. 45 (negotiability standard should not rest on considerations of "effective-

bodies a judicial presumption about implicit congressional delegations of authority to agencies to interpret ambiguous provisions. See generally *Pauley* v. *BethEnergy Mines, Inc.*, 501 U.S. 680, 696 (1991). Application of that general presumption would be inappropriate where it would thwart a clear congressional policy choice set forth in an express and plainly relevant statutory rule of construction. See also *BATF*, 464 U.S. at 97 (invalidating FLRA policy because courts "must not 'rubber-stamp . . . administrative decisions that they deem inconsistent with a statutory mandate or that frustrate the congressional policy underlying a statute'").

Second, the cause of the FLRA's abrupt change of position between *IRS I* and *IRS II* was a lower court's rejection of the former decision. As the Fourth Circuit observed, "the FLRA simply adopted the position taken by the D.C. Circuit" and, in subsequent cases, "adhered to its position in *IRS II*, without additional discussion or analysis." *SSA*, 956 F.2d at 1283; see also *Department of Commerce, Patent & Trademark Office*, 53 F.L.R.A. 539, 552, 554 (1997) (adhering to *IRS II* without reexamining merits); *HHS/SSA*, 47 F.L.R.A. at 1013 (same); *Headquarters, 127th Tactical Fighter Wing, Mich. Air Nat'l Guard*, 46 F.L.R.A. 582, 583 (1992) (same); *Patent & Trademark Office*, 45 F.L.R.A. 1090, 1091 n.2 (1992) (same), pet'n for enforcement denied, 991 F.2d 790 (4th Cir. 1993) (Table). This Court should be circumspect in applying the *Chevron* principle where, as here, an agency's reversal of interpretation appears to be attributable more to a lower court's adverse ruling than to the agency's own policy choice. See *Atchison, T. & S.F. Ry.* v. *Peña*, 44 F.3d 437, 442-443 (7th Cir. 1994) (en banc), aff'd on other grounds *sub nom. Brotherhood of Locomotive Eng'rs* v. *Atchison, T. & S.F. Ry.*, 516 U.S. 152 (1996). While

---

ness and efficiency" because bargaining often "impact[s] on government effectiveness").

this Court often "carefully consider[s] the opinions" of the courts of appeals, it "certainly do[es] not defer to them." *Id.* at 443.

II. THE FLRA MAY NOT USE CONTRACTUAL MIDTERM BARGAINING CLAUSES TO CREATE INDIRECTLY A MIDTERM BARGAINING REGIME THAT THE STATUTE HAS REJECTED

As demonstrated above, petitioners' interpretation of the Statute is wrong *not* because Congress was "silent" (FLRA Br. 19) on the general availability of midterm bargaining, but because Congress deliberately excluded such bargaining from this statutory scheme. Petitioners nonetheless argue that, even if that is so, the FLRA may still compel individual employers to negotiate about a proposal that would impose precisely the midterm bargaining obligations that the Statute withholds. That argument is inconsistent with both the text and the policy of the Statute.

In the public sector, declaring a proposal to be a mandatory subject of bargaining has critical substantive consequences that it does not have in the private sector. The duty to bargain in the private sector is a duty to talk about something in good faith, and if the parties reach impasse, neither can force the other to submit to government intervention on the substance of the dispute. See p. 22, *supra*. In the public sector, by contrast, the duty to bargain about a proposal confronts agency employers with the prospect that the Impasses Panel will impose that proposal on them against their will, as the FLRA freely acknowledges. See FLRA Br. 47 n.21 (citing 5 U.S.C. 7119(c)(5)); see also *HHS*, 844 F.2d at 1089; *Department of Defense, Army-Air Force Exchange Serv.* v. *FLRA*, 659 F.2d 1140, 1146 (D.C. Cir. 1981). What petitioners seek, therefore, is not simply a rule compelling agency employers to talk about expansive midterm bargaining clauses, but a rule authorizing the FLRA and the Impasses Panel to usher in through the back door the very

midterm bargaining regime that Congress, by its plain choice of language, rejected.[16]

A. The FLRA ordered the agency employer in this case to bargain about the following midterm bargaining clause:

> Union-initiated Bargaining. The Union may request and the Employer will be obliged to negotiate on any negotiable matters not covered by the provisions of this agreement

FLRA Pet. App. 14a. Two features of that proposed clause are significant. First, it is essentially content-neutral. Second, it is fully coextensive with the scope of the midterm bargaining obligation that petitioners would (erroneously) read into the Statute itself. The question here is whether that clause is a mandatory subject of bargaining, subject to binding arbitration upon impasse. Cf. note 19, *infra*.

Both petitioners identify Section 7117(a) as the source of an employer's putative obligation to bargain about such clauses. See FLRA Br. 37; NFFE Br. 30. For present pur-

---

[16] The FLRA cites only one case in which the Impasses Panel has *not* resolved a disagreement about a proposed midterm bargaining clause by imposing such a clause on the agency employer. See FLRA Br. 43 n.18; compare *DOE*, 106 F.3d at 1161. In that case, however, the Impasses Panel rejected such a clause on the theory that it merely "restate[d] rights already governed by law" and was therefore "unnecessary." See *Department of Health & Human Servs., Social Security Admin.*, No. 94 F.S.I.P. 47, 1994 WL 412309, at *8 (Aug. 3, 1994). The FLRA speculates that if this Court were to "conclude that there is no statutory obligation to bargain midterm, but find that the matter is negotiable," the Impasses Panel would then "resolve any impasse over midterm bargaining on the merits of the individual case." Br. 43-44. The FLRA proposes no determinate standards for such an inquiry, however, intimating only that concerns about "effectiveness and efficiency" would play little role. Br. 45. In the end, the FLRA acknowledges that such a holding would create a "potential anomaly," which it urges this Court to "[a]void[ ]" by finding that the Statute itself imposes rights of midterm bargaining. Br. 44 n.19. The "potential anomaly," however, is entirely of the FLRA's own making, and the correct way to "avoid" it is to affirm the decision below.

poses, we assume that Section 7117(a) affirmatively directs an agency employer, in the FLRA's words (Br. 37), "to bargain over all conditions of employment unless the bargaining proposal is inconsistent with law, a government-wide regulation, or an agency regulation for which a compelling need exists."[17] Even on that assumption, Congress's deliberate exclusion of any midterm bargaining obligation precludes, for two separate reasons, petitioners' attempt to compel employers to bargain about, and face the prospect of binding arbitration on, that very obligation.

First, the topic of this proposed midterm bargaining clause is not a "condition[] of employment," as the term is defined in Section 7103(a)(14).[18] That provision specifically removes from the scope of the term, and thus from any collective bargaining obligation, any "matters" that "are specifically provided for by Federal statute." 5 U.S.C. 7103(a)(14)(C); see generally 5 U.S.C. 7103(a)(12). As dem-

---

[17] Section 7117(a)(1) does not actually say that. It provides that, "[s]ubject to paragraph (2) of this subsection, the duty to bargain in good faith shall, to the extent not inconsistent with any Federal law or any Government-wide rule or regulation, extend to matters which are the subject of any rule or regulation only if the rule or regulation is not a Government-wide rule or regulation." 5 U.S.C. 7117(a)(1). Section 7117(a)(2) provides that "[t]he duty to bargain in good faith shall, to the extent not inconsistent with Federal law or any Government-wide rule or regulation, extend to matters which are the subject of any agency rule or regulation referred to [in a separate provision, not applicable here] only if the Authority has determined under [5 U.S.C. 7117(b)] that no compelling need (as determined under regulations prescribed by the Authority) exists for the rule or regulation." 5 U.S.C. 7117(a)(2).

[18] We assume, for the sake of argument, that the issue of midterm bargaining meets the *threshold* criterion for a "condition of employment"—that it constitutes a "matter[] * * * affecting working conditions." 5 U.S.C. 7103(a)(14). That language would seem to focus, however, on primary, substantive matters concerning employment itself, not on every issue relating to the structure of bargaining about those matters. Cf. *Fort Stewart Schools*, 495 U.S. at 645-646.

onstrated in Point I above, Congress *did* "specifically provide[] for" the scope of an agency employer's bargaining obligations. Congress specifically addressed and defined those obligations in Section 7114(a)(4); by restricting them to negotiations "for the purposes of *arriving at* a collective bargaining agreement," it deliberately *excluded* the general midterm bargaining rights it had *included* in the corresponding provisions of the NLRA; and, when it created midterm bargaining rights at all in the public sector, it limited them to the particular circumstance in which management makes midterm changes to the conditions of employment. See pp. 11-21, *supra*. In short, Congress repudiated the bargaining regime which the FLRA would read into the Statute and which has been replicated in miniature in this midterm bargaining clause.

Moreover, even if the issue of midterm bargaining *were* a "condition of employment," and even if Section 7117(a) could be construed to impose a general obligation to bargain about conditions of employment, that provision also specifically exempts an agency employer from any such obligation if compliance would be "inconsistent with any Federal law." 5 U.S.C. 7117(a). Adoption of the midterm bargaining clause at issue here would indeed be inconsistent with federal law, because the clause is exactly coextensive with a midterm bargaining policy that Congress rejected for the public sector but embraced for the private sector. Congress's rejection of that bargaining policy in this context, and its enactment instead of the more limited bargaining obligation set forth in Section 7114(a)(4), constitute a deliberate statutory choice, based on a particular conclusion about the undesirability of open-ended midterm bargaining. That statutory choice is as binding on an agency employer as on the FLRA itself.

In enacting the Statute, Congress was not creating waivable default rules to mediate the rights of private parties. Congress was making basic policy decisions for every

agency of the government: decisions about governmental efficiency and fiscal responsibility that no agency may "waive." Just as Congress prohibited individual agencies from committing certain substantive issues (such as their "mission," "budget," and "internal security practices") to the collective bargaining process, *e.g.* 5 U.S.C. 7106(a)(1), so too did it prohibit individual agencies from committing themselves to the very regime of open-ended midterm bargaining that Congress itself had deemed inconsistent with "the requirement of an effective and efficient Government." 5 U.S.C. 7101(b). Here, respondent could not have "lawfully agree[d]" to a midterm bargaining clause indistinguishable from that regime, and respondent therefore "ha[d] no obligation to negotiate over it." *Overseas Educ. Ass'n* v. *FLRA*, 827 F.2d 814, 818 (D.C. Cir. 1987); accord *Indiana Air Nat'l Guard* v. *FLRA*, 712 F.2d 1187, 1189 n.1 (7th Cir. 1983).[19]

The FLRA suggests (Br. 39) that its contrary position, which would compel an agency to bargain about such clauses, is somehow necessary to avoid limiting "the universe of bargainable matters * * * to preexisting statutory entitlements." That is simply wrong. Countless issues concerning "conditions of employment" arise in the public sector, and a great many of those issues have never been the subject of a statutory policy judgment. That is particularly true of primary issues about substantive workplace conditions, as distinguished from issues concerning the structure of bargaining itself, which the Statute resolves in many important re-

---

[19] A proposal is negotiable *only* if it "is consistent *as drafted* with applicable law and regulations," *Indiana Air Nat'l Guard*, 712 F.2d at 1189 n.1 (emphasis added), and thus "[t]he fact that the scope of the proposal could be narrowed in the bargaining process is immaterial," *Overseas Educ. Ass'n*, 827 F.2d at 818. For that reason, this case does not present the question whether a substantially narrower midterm bargaining clause would be negotiable if it did not commit an employer to the open-ended midterm bargaining obligation that Congress deliberately repudiated.

spects. Cf. *BATF*, 464 U.S. at 107 n.17 (speculating, in dicta, that parties could "presumably" bargain about certain travel and per diem payments, which were not required by statute, but which *had* been historically permitted in some circumstances and had *not* been generally disfavored (see *id.* at 100-101 n.11, 106)). This case presents an issue that the Statute *does* resolve, and the FLRA lacks authority to seek a contrary resolution, whether directly (by misinterpreting the Statute's bargaining provisions) or indirectly (through midterm bargaining clauses). See *id.* at 108.

B. Even absent a midterm change in working conditions, employers and unions are free to engage in midterm bargaining on particular issues to the extent both parties agree to do so at the time of the bargaining. Such voluntary negotiations do not create any open-ended bargaining obligation at all, much less a miniature replica of the bargaining regime that Congress deemed appropriate only for the private sector. Because such negotiations are wholly volitional for both parties, neither can demand that the other bargain to impasse or submit to the FLRA's impasse procedures. See generally *Department of Commerce, Patent & Trademark Office*, 53 F.L.R.A. 858, 870-875 (1997); see also note 21, *infra*. Just as important, because neither party can force the other to engage in midterm bargaining (except where an agency changes the conditions of employment), and because either can simply walk away from any such bargaining, the mere possibility that such bargaining might occur gives the union no incentive to "hold [a] matter off until the term agreement is done and then initiate the proposal as part of a single-issue negotiation where it is not as likely to suffer from a tradeoff among issues." *Catalyst*, *supra*, at 411. In short, whereas the enforcement of expansive midterm bargaining clauses "encourage[s] dispersal of the collective bargaining process," *IRS I*, 17 F.L.R.A. at 736-737, the prospect of voluntary midterm negotiations on particular topics is en-

tirely consistent with the congressional policy judgment underlying this statutory scheme.

The FLRA suggests (Br. 45-46) that, because an agency employer may engage in such negotiations, it must also have the power to commit itself contractually to do so. From that initial premise, the FLRA concludes (*ibid.*) that the employer must therefore negotiate about whether to make such a contractual commitment; it reasons that "where an agency has discretion under law to act with respect to conditions of employment, it has an obligation to bargain over the exercise of that discretion." *Ibid.*[20] The initial premise, on which the argument rests, is false. Although an agency employer does have discretion to engage in voluntary midterm bargaining on particular issues as they arise, it has no discretion to bind itself *in advance* to such bargaining in the future on a universe of possible issues. Having no discretion to make such a commitment, the agency cannot be compelled to bargain about it. In drawing its contrary conclusion, the FLRA has conflated two very different things: individualized, voluntary discussions that the parties agree to have *when they have them*, and an agency's *advance commitment* to bargain to impasse whenever a union wishes to address any issue it did not raise in the underlying term negotiations. But that distinction is critical, because, as just discussed, the latter threatens a congressional policy judgment, whereas the former does not.

---

[20] The single lower court decision from which the FLRA (Br. 45-46) and petitioner NFFE (Br. 30-31) would derive the latter proposition—*Department of the Treasury* v. *FLRA*, 836 F.2d 1381 (D.C. Cir. 1988)—upheld the FLRA's application of similar reasoning to a particular bargaining issue, but did not hold that the proposition is always valid as a categorical matter. See *id.* at 1384-1385 (upholding duty to bargain about payment of travel expenses in light of "the past interpretations of [a different federal statute] permitting agencies to pay for travel in this context").

In this context, the FLRA's negotiability analysis operates only as a device to subvert Congress's view on a subject comprehensively addressed by the Statute itself: the basic structure of public-sector bargaining. Indeed, the FLRA's decisions in other contexts comport with a distinction between "contract provisions which establish or define specific conditions of employment," which are generally mandatory subjects of bargaining, and "provisions restricting or modifying the collective bargaining system provided for in the Statute," over which an agency may not be forced to bargain. *FAA Northwest Mountain Region*, 14 F.L.R.A. 644, 647-648 (1984); cf. *FAA, Washington, D.C.*, 20 F.L.R.A. 273, 287-288 (1985).[21] Here, even if individual agency employers had discretion to depart from Congress's considered rejection of open-ended midterm bargaining commitments (which they do not), the FLRA may not *itself* systematically short-circuit that judgment throughout the federal government by using the statutory impasse procedures to impose its counterstatutory collective bargaining regime on unwilling agencies. That would "constitute[] an unauthorized assumption by the agency of a major policy decision properly made by Congress," *BATF*, 464 U.S. at 108 (internal quotation marks and brackets omitted), and it would violate the FLRA's most basic instruction: to

---

[21] The FLRA suggests (Br. 46 n.20) that an issue must be a topic of mandatory bargaining unless it falls within the scope of an explicit exemption, such as those set forth in the management rights provision of Section 7106(a). But those exemptions focus on primary, substantive conditions of employment, not on the structure of bargaining itself. The inclusion of those exemptions cannot plausibly be read to imply anything about the negotiability of second-order topics of bargaining such as the availability of *further* bargaining during a contractual term. See *FAA Northwest Mountain Region*, 14 F.L.R.A. at 648 ("permissive" subjects include not just "those matters which are excepted from the obligation to negotiate by section 7106(b)(1)," but also "those matters which are [otherwise] outside the required scope of bargaining under the Statute").

interpret this statute "in a manner consistent with the requirement of an effective and efficient Government." 5 U.S.C. 7101(b).

CONCLUSION

The judgment of the court of appeals should be affirmed.

Respectfully submitted.

SETH P. WAXMAN
Solicitor General
FRANK W. HUNGER
Assistant Attorney General
BARBARA D. UNDERWOOD
Deputy Solicitor General
JONATHAN E. NUECHTERLEIN
Assistant to the Solicitor General
WILLIAM KANTER
ROBERT M. LOEB
SUSHMA SONI
Attorneys

SEPTEMBER 1998